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Investor to State Dispute Settlement

A Challenge for Democracy, Ethics, the Environment, and the Rule of Law

Abstract

Until recently, international trade agreements did not cause any public reaction and were considered irrelevant to everyday life. The experience of the existing international trade agreements from NAFTA, through TPP, to TTIP and CETA, which are in the process of negotiations or ratification, has shown that they have a huge impact on the daily lives of citizens and affect the entire society and economy. These agreements are negotiated and concluded by neglecting ethical principles, democratic procedures, and human rights, where only economic interests are taken into account. In this paper we will explore how these agreements undermine universal ethical principles and democratic standards through the ISDS mechanism, imposing the economic interest of large capital against the welfare of society, the individual, and the environment. We will refer particularly to the work of Alfred-Maurice de Zayas, the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order (also known as Special Rapporteur), who in his reports to the United Nations General Assembly and in media appearances fiercely criticises the ISDS mechanism and its implementation in agreements such as CETA and TTIP.

Keywords

international trade agreement, ISDS, TTP, TTIP, CETA, Alfred-Maurice de Zayas, Special Rapporteur, United Nations, democracy, capitalism

Introduction

We live in a time of intensive globalisation which, according to a well-rehearsed narrative, spreads freedom and systematically removes barriers among world states. Unfortunately, globalisation in today's form is almost always reduced to the elimination of barriers to the free movement of goods and capital, with the borders remaining firmly closed for the smooth circulation of people, as witnessed by the recent refugee crisis facing the EU. The success of globalisation largely depends on international trade agreements, which set out the rules of conduct in international trade and oblige signatory states to act in accordance with the objectives of agreements with their legal effect. Thanks to the fierce debate over TTIP in Europe, citizens become more aware of the controversy over international rules and laws on investing and protecting foreign investors. Critics call out this system a "system of parallel justice in the name of money"¹

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Petra Pinzler, Wolfgang Uchtaius, Kerstin Kohlenberg, "Im Namen des Geldes", *Die Zeit* 10 (2014).

as one of the main threats to democracy. There are thousands of bilateral trade and investment agreements around the world, and a large part of them have a clause enabling foreign investors investment protection in foreign *ad hoc* courts. It is about the investor-state dispute settlement system that has recently become known for its sinister abbreviation ISDS. ISDS gave rise to a huge uproar since the public was unaware of the existence of this system for decades in international trade. Below we will present the historical development of international investment laws from which ISDS arose. Through a multitude of examples, we will point out the danger of ISDS for the future of democracy and the undermining of state sovereignty in favour of corporations.

A brief history of the ISDS mechanism

The possibility to invest abroad is key to the development of international corporations and their global production chains. Foreign investments allow corporations direct access to markets, technology, cheap raw materials, and workforce. Openness to foreign investment is almost always seen as a key factor in international relations, and the success of individual states is assessed by it. This was especially apparent after the Second World War when there was an increase of interstate contracts imposing certain obligations on the contracting parties involved in investments and investors from other countries. Such contracts, for example, may prescribe that a state immediately has to pay compensation for expropriation or a measure equal to expropriation and that investors are given direct rights to sue them before an international court in the event of a dispute. There are more than 3,200 such contracts in the world, most of which are bilaterally based. According to available data from 2012, Croatia has concluded bilateral investment agreements which include an investor protection clause with about 50 states.² According to the UN Conference on Trade and Development (UNCTAD), in recent years a new investment agreement is concluded on average every week.³ It is important to understand that these agreements have been made almost exclusively between the developed North and the underdeveloped South. In the 1950s and 1960s, the rich states of the North wanted to protect the capital they “exported” to their former colonies through such agreements. In the 1970s, this type of contract was a part of the protection of the rich states from the desire of the poor states to change economic relations, which was clearly stated in the United Nations General Assembly’s Declaration on the Establishment of a New International Economic Order in 1974.⁴ After the debt crisis in the 1980s and the unsuccessful structural adjustment measures in the states of the South, there was an increase in the dependence on private capital flows, which in the 1990s led to a strong growth in private equity investment in the states of the global South and consequently to a huge increase in the number of contracts on investing. We must not forget the dominant role of neoliberal capitalism with its demand for the opening of all sectors of the market and the constant mantra of market infallibility and unrestrained private equity movement towards the states and sectors that offer the highest profit.

A question arises regarding why would states sign such agreements that severely restrict their sovereignty? Why do they give private arbitration courts the power to review their decisions, to grant compensation and strictly limit government regulations? The same question is asked by the Spanish arbitrator Fernández-Armesto when he says:

“When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all (...) Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament.”⁵

The answer involves a mixture of interests, misunderstandings, and ignorance: interests, since it is in the interest of the states from which investments come from to protect investor rights of “their” corporation abroad; misunderstandings, since underdeveloped countries have hoped to attract foreign investment through these agreements; ignorance, since the question remains whether these agreements have led to more investment. The conducted quantitative studies produce contradictory results. Qualitative studies suggest that investment agreements play a minor role or do not play any role in corporations’ decision-making on investing in a certain state. When the European Commission interviewed 300 European companies, half of them did not know what the investment agreement was, which clearly states that even the companies in whose favour they are signed are not aware of the volume of rights that investment agreements offer.⁶ That investment agreements do not necessarily lead to a rise in foreign investment is also witnessed by the case of the South African Republic, which has recently started to cancel bilateral agreements. South Africa’s Deputy Director General from the Department of Trade and Industry Xavier Carim voiced the reason for the cancellation of bilateral agreements:

“We do not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, we continue to receive investment from jurisdictions with which we have no BITs. In short, BITs are not decisive in attracting investment.”⁷

Besides the South African Republic, the case of Brazil should also be mentioned, Brazil which in bilateral agreements does not have a clause on the protection of foreign investors by way of ISDS, and yet has a strong growth in foreign investment.

States often enter into such agreements because they cannot escape the prevailing notion that foreign investment is a solution to all economic problems

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United States Department of State, *Croatia: Investment Climate Statement 2015*. Available at: <https://2009–2017.state.gov/documents/organization/241740.pdf> (accessed on 10 January 2018).

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United Nations Conference on Trade and Development (UNCTAD), “IIA Issues Note. Towards a New Generation of International Investment Policies: UNCTAD’s Fresh Approach to Multilateral Investment Policy-Making” (July 2013). Available at: https://unctad.org/en/PublicationsLibrary/webdi-aepcb2013d6_en.pdf (accessed on 14 February 2018).

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UN General Assembly, “3201 (S-VI). Declaration on the Establishment of a New International Economic Order A/RES/3201(S-VI)” (1 May 1994). Available at: <https://www.refworld.org/docid/3b00f1e048.html> (accessed on 14 February 2018).

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George Monbiot, “This transatlantic trade deal is a full-frontal assault on democracy”, *The Guardian* (4 November 2013). Available at: www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy (accessed on 10 January 2018).

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European Commission, *Survey of the attitudes of the European business community to international investment rules*. Available at: http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_111125.pdf (accessed on 10 January 2018).

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Meena Raman, “BITs ‘not decisive in attracting investment’, says South Africa”, *Third World Network* (8 October 2012). Available at: <http://www.twn.my/title2/wto.info/2012/twninfo121001.htm> (accessed on 10 January 2018).

and because of their lack of awareness of the political and economic risks that may arise with the conclusion of such agreements. In the past, it was not uncommon for negotiations on agreeing to end after a few hours or not to involve politicians and lawyers at all. It is no surprise then that politicians did not even know what they signed, as witnessed by a former Chilean negotiator:

“Like most countries in the 1990s, we signed a lot of treaties not sometimes knowing what we were committing ourselves to.”⁸

The risks often become apparent many years later, when a state becomes a target of lawsuits. The United Nations Conference on Trade and Development (UNCTAD) data confirms these are not vague claims, according to which about three-quarters of all suits relate to developing countries, and in 85% of cases, prosecutors are from the wealthy countries of the West.⁹ The countries against which the highest number of lawsuits are filed are Argentina and Venezuela. However, that this kind of lawsuits is not reserved for the countries of the South is also witnessed by the data that the Czech Republic is currently the third most sued country, and Spain is the fourth, while almost one third of all the lawsuits filed in 2016 refers to developed countries, most of which are members of the European Union.¹⁰

A special problem is the extent of “violations” by states, which has drastically increased in the last twenty years or so. While initially arbitrary and direct expropriation and discrimination of foreign investors were considered sufficient grounds for initiating an arbitration dispute against a state, recently there has been a trend of initiating arbitration disputes to challenge laws passed in a democratic way in accordance with the public interest and national laws. It remains unclear to an uninformed observer how is it legally even possible to sue sovereign states for passing laws which promote public interest, health and environment protection. International investment law experts point out that the major problem is the ambiguously formulated, but far-reaching guarantees of the protection of the right of ownership of an investor in international investment law.¹¹ For example, some judges of the arbitral tribunals interpret the term “fair and equitable treatment” to foreign corporations in such a way that local and state-level representatives should always act completely transparently and consistently, and should not fail “legitimate expectations” of investors in relation to the regulatory environment when it comes to their investment.¹²

Put simply, if the regulations change in relation to the expected, then investors can file a lawsuit against a state seeking compensation for the loss of “expected future profit”. An exceptionally big problem is the protection against “indirect expropriation”, which does not exist in this form in national legislation, is defined in investment contracts, and guarantees foreign investors compensation if their property loses value as a result of regulation. All of this leads to the “chilling effect”, whereby at the very announcement of a possible lawsuit, the state withdraws or modifies the planned regulatory measures.

What this is about is well illustrated in a former Canadian government official’s report:

“I’ve seen the letters from the New York and [Washington] DC law firms coming up to the Canadian government on virtually every new environmental regulation (...). Virtually all of the new initiatives were targeted and most of them never saw the light of day.”¹³

We will list a few examples to show this is not an exaggeration. It is reported that the mere threat of an investor-state dispute settlement case stopped Canada from banning the words “light” and “mild” in its tobacco control laws.¹⁴

Few examples of current disputes between investors and states will clarify what this is all about.

Ethyl Corp. vs. Canada

The relationship between expropriation provisions and the protection of human rights warrants particular attention as existing cases suggest that investor-to-State tribunals are willing to interpret such provisions broadly, which could affect States' ability to regulate in favour of human rights.

"For example, in 1997, the Government of Canada had introduced a ban on the import of the additive methylcyclopentadienyl manganese tricarbonyl (MMT). The Government justified the ban primarily on the ground that it had not adequately assessed toxic qualities of MMT. Ethyl Corp., the only manufacturer of the substance in the world, commenced proceedings against the Government of Canada including a claim that the introduction of the ban was an expropriation of its investment or, alternatively, that it was "tantamount" to expropriation of its investment. The parties subsequently settled the proceedings and the Canadian Government withdrew the legislation, paid \$13 million for costs and lost profits while the legislation was in place and gave Ethyl Corp. a letter authorizing the use of MMT, stating that there was no scientific evidence of any health risk or any impact on car exhaust systems (*Ethyl Corp v. Canada*)."¹⁵

Vattenfall vs. Germany

The Swedish energy corporation Vattenfall brought a \$1,9 billion lawsuit against Germany in 2009. The lawsuit was based on the protection of investors' rights under the Energy Charter Treaty due to the delay of the working license for a coal-fired power plant in Hamburg. According to Vattenfall's

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Lauge N. Skovgaard Poulsen, "Bounded Rationality and the Diffusion of Modern Investment Treaties", *International Studies Quarterly* 58 (2013) 1, pp. 1–14, doi: <https://doi.org/10.1111/isqu.12051>.

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UNCTAD, *Recent Developments in Investor-State Dispute Settlements (ISDS)* (May 2013). Available at: https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (accessed on 14 February 2018).

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Ibid.

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Cf. Rhea Tamara Hoffmann, "Universalismus oder Vollstreckung partikularer Interessen? Eigentum zwischen Menschenrecht, Investitionsschutz und demokratischem Eigentumskompromiss", *Juridikum* (2013) 3, pp. 361–373; Markus Krajewski, "Vattenfall, der deutsche Atomausstieg und das internationale Investitionsrecht", *Juridikum* (2013) 3, pp. 348–360; Gus van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford 2007.

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Nathalie Bernasconi-Osterwalder, Rhea Tamara Hoffmann, "The German Nuclear Phase-Out Put to Test in International Investment Arbitration? Background to the new

dispute Vattenfall v. Germany (II)", *International institute for sustainable development* (June 2012). Available at: http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf (accessed on 10 January 2018).

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"Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals", *Corporate Europe Observatory* (16 April 2014). Available at: <https://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade> (accessed on 10 January 2018).

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"NAFTA Chapter 11 Investor-State Cases: Lessons for the Central America Free Trade Agreement", *Public citizen* (February 2005). Available at: https://www.citizen.org/sites/default/files/naftareport_final.pdf (accessed on 10 January 2018).

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Commission on human rights, "Economic, social and cultural rights: Human rights, trade and investment. Report of the High Commissioner for Human Rights" (E/CN.4/Sub.2/2003/9), Economic and Social Council, United Nations 2003. Available at: <https://undocs.org/E/CN.4/Sub.2/2003/9> (accessed on 10 January 2018).

interpretation, delays in the required state licenses began when the ministry of environment established “very clear requirements” for the power plant due to reports of the Intergovernmental Panel on Climate Change which warned the public about the upcoming climate change. The public’s opposition to the construction of the power plant occurred due to fears of future carbon dioxide emissions and water pollution. Further delays, according to Vattenfall, occurred when a Green party, which had opposed the construction of the power plant due to environmental concerns, formed a coalition with Christian democrats after the local elections in 2008. After litigation at domestic courts, the coalition government issued licenses to Vattenfall, but with additional requirements for the protection of the River Elbe. Instead of aligning the power plant construction project with additional requirements, Vattenfall filed a lawsuit against Germany, claiming the environmental protection requirements led to the expropriation and violation of German obligations towards foreign investors on “fair and just treatment”.¹⁶ Responding to the lawsuit, then deputy environment minister Michael Müller stated “it’s really unprecedented how we are being pilloried just for implementing German and EU laws”.¹⁷ To avoid a possible payment of huge financial compensation, Germany agreed to enter into a settlement with the corporation in 2010. The settlement obliged Hamburg’s local authorities to reject additional environmental protection requirements and issue the disputed license to continue construction of the power plant. With this settlement, Vattenfall also abandoned the previously assumed commitment on the mitigation of the damaging impact of the power plant on the River Elbe. It should be noted that the amount of financial compensation paid to Vattenfall by the agreed settlement is unknown. The power plant started working in February 2014.

Infinito Gold vs. Costa Rica

The Canadian mining corporation Infinito Gold filed a lawsuit against the Government of Costa Rica’s decision to deny the concession for the operation of an open gold mine in February 2014. Costa Rica took the license based on the estimated adverse environmental impact. The mining concession was approved by then-President Oscar Arias and his minister of environmental protection in 2008. The Costa Rican Administrative Court of Appeal ordered the initiation of the investigation against President Arias for issuing a mining concession before a study on environmental impact had been completed.¹⁸ The concession grant caused great concern due to environmental damage, including logging 50 hectares of untouched rainforests. A major cause for concern was the use of chemicals in the mining process that can contaminate drinking water sources and end up in the San Juan River.¹⁹ In 2010, the Costa Rican Court cancelled the concession for mining based on the environmental damage caused by this project. Polls showed that as many as 75% of Costa Rican citizens had opposed the proposed project for several reasons, including fears of environmental change, several weeks before the Costa Rican Court revoked the mining concession. The Costa Rican Parliament passed a unanimous decision to ban open-cast mines.²⁰ After the Supreme Court of Costa Rica confirmed the lower court’s decision, the Infinito Gold filed a lawsuit.²¹ In the lawsuit, the corporation asks that the decision to ban the opening of open-cast mines be declared “unlawful expropriation” of their property and a violation of the rights established by the bilateral investment agreement on “fair and just treatment”. In the conclusion of the request, it says that “as a result of the new ban on open-pit mining, Industrias Infinito cannot apply for any new mining rights over the project area”.²² The case is in process.

What experts say about the ISDS mechanism

The questionable ethics of the ISDS mechanism in international trade agreements is pointed out by many experts around the world. Below we will list the opinions of some experts and trade unions, and we will especially refer to the reports of Alfred-Maurice de Zayas, the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order (Special Rapporteur).

Joseph Stiglitz Nobel prize laureates in economics have already signalled the dangers to democratic governance and human rights. Stiglitz states:

“These agreements go well beyond trade, governing investment and intellectual property as well, imposing fundamental changes to countries’ legal, judicial, and regulatory frameworks, without input or accountability through democratic institutions. Perhaps the most invidious – and most dishonest – part of such agreements concerns investor protection. Of course, investors have to be protected against the risk that rogue governments will seize their property. But that is not what these provisions are about. There have been very few expropriations in recent decades, and investors who want to protect themselves can buy insurance from the Multilateral Investment Guarantee Agency, a World Bank affiliate (the US and other governments provide similar insurance). (...) The real intent of these provisions is to impede health, environmental, safety, and, yes, even financial regulations.”²³

In the article “The Trans-Pacific Free-Trade Charade”, Stiglitz, using asbestos as an example, makes a good point on unethicity of the ISDS mechanism:

“Imagine what would have happened if these provisions had been in place when the lethal effects of asbestos were discovered. Rather than shutting down manufacturers and forcing them to compensate those who had been harmed, under ISDS, governments would have had to pay the manufacturers not to kill their citizens. Taxpayers would have been hit twice – first to pay for the health damage caused by asbestos, and then to compensate manufacturers for their lost profits when the government stepped in to regulate a dangerous product.”²⁴

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“Request for Arbitration”, *Italaw* (30 March 2009). Available at: <http://www.italaw.com/documents/VattenfallRequestforArbitration.pdf> (accessed on 10 January 2018).

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Sebastian Knauer, “Power Plant Battle Goes to International Arbitration”, *Spiegel Online International* (15 July 2009) Available at: <http://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334.html> (accessed on 14 February 2018).

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Zack Dyer, Tania Lara, “3 years after Costa Rica kicked out gold-mining company, legal battle continues”, *Tico Times* (22 November 2013). Available at: <https://ticotimes.net/2013/11/22/3-years-after-costa-rica-kicked-out-gold-mining-company-legal-battle-continues> (accessed on 14 February 2018).

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Zach Dyer, “Infinito Gold to sue Costa Rica in World Bank court for \$1 billion”, *Tico Times* (3 October 2013). Available at: <https://ticotimes.net/2013/10/04/infinito-gold-to-sue-costa-rica-in-world-bank-court-for-1-billion> (accessed on 14 February 2018).

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Mike McDonald, “Costa Rica Bans Open Pit Mining for Metals”, *Tico Times* (9 November 2010). Available at: <https://ticotimes.net/2010/11/10/costa-rica-bans-open-pit-mining-for-metals> (accessed on 14 February 2018).

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Z. Dyer, “Infinito Gold Files Lawsuit Against Costa Rican Government Over Cancelled Gold Mining Contract”.

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“Request for Arbitration”, *Italaw*.

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Joseph E. Stiglitz, “The Secret Corporate Takeover”, *Project Syndicate* (13 May 2015). Available at: <https://www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05?barrier=accessreg> (accessed on 10 January 2018).

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Joseph E. Stiglitz, “The Trans-Pacific Free-Trade Charade”, *Global thought Columbia University* (2 October 2015). Available at: <http://cgt.columbia.edu/news/stiglitz-the-trans-pacific-free-trade-charade/> (accessed on 10 January 2018).

Lori Wallach, the director of NGO Public Citizen, argues that ISDS mechanism can:

“... allow companies to challenge public interest regulations outside of domestic court systems before tribunals of three private-sector trade attorneys operating under minimal to no conflict of interest rule. These arbitrators can order governments to pay corporations unlimited taxpayer-funded compensation for having to comply with policies that affect their future expected profits, and with which domestic investors have to comply.”²⁵

Ska Keller, MEP and co-president of the Green/EFA in the European Parliament, wrote that:

“Democratic decision-making is forcefully going under the knife through international arbitration. The accused states have only two options: either they can be like others and take back the decisions they have made, or they can pay huge sums in compensation to the investor.”²⁶

Daniel J. Ikenson from the conservative think-tank Cato Institute made interesting observations on the role of the ISDS mechanism; he concludes that “investor-State dispute settlement turns national treatment on its head, giving privileges to foreign companies that are not available to domestic companies”.²⁷

We especially emphasise the opposition of the German Association of Judges (Deutscher Richterbund – DRB), the largest professional organisation of judges in Germany with 16,000 members. They raised objections against the introduction of an ICS. In its “Opinion on the Constitution of an Investment Court for TTIP”, the DRB rejects the proposal of the European Commission to establish an ICS and declares that there is neither a legal basis for such a proposal nor a necessity to introduce a special court for foreign investors seeking legal protection in the European Union. They put forward “three reasons against the introduction of an ICS”: 1. The European Union has no Legislative Competence to Create an Investment Court. 2. No Independence of the Judges. 3. Sufficient Protection of Interest of Foreign Investors by Court of Member States.²⁸

Alfred-Maurice de Zayas is an Independent Expert appointed in 2012 by the Human Rights Council to examine and report on a specific human rights issue or theme.²⁹ On 10 September 2015 “he presented his fourth report to the Council on the adverse human rights impacts of free trade and investment agreements on a democratic and equitable international order, and on 26 October 2015 to the General Assembly on the issue of investor-state dispute settlement”.³⁰ The main observations and criticism of the ISDS mechanism described in these reports were reported by news outlets such as Reuters,³¹ The Guardian,³² and The Independent.³³

In his reports, UN Special Rapporteur de Zayas emphasises the lack of democratic legitimacy:

“Investor-State dispute settlement is a rather recent and arbitrary construction, a privatized form of dispute settlement that accompanies many international investment agreements. Rather than litigating before local courts or invoking diplomatic protection, investors rely on three arbitrators who in confidential proceedings decide whether their rights and investment have been violated by a State. Whereas investor-State dispute settlement tribunals can entertain suits by investors against States, they do not entertain suits by States against investors, for example, when investors violate national laws and regulations, pollute the environment and the water supplies, introduce potentially dangerous genetically modified organisms, etc. A birth defect of investor-State dispute settlement is its ‘Trojan horse’ quality: it was introduced into international investment agreements without full disclosure as to its potentially intrusive application, without the participation of key stakeholders at the time of elaboration and without public referendum, hence lacking democratic legitimacy. Bearing in mind their impacts, Governments have a duty

to proactively inform constituents. Not doing so amounts to violating articles 19 and 25 of the International Covenant on Civil and Political Rights.”³⁴

Besides highlighting the lack of democratic legitimacy, de Zayas goes on to outline the reasons for the opposition to the ISDS mechanism and writes:

“There are multiple reasons to oppose investor-State dispute settlement, based on the necessities of democratic governance, the administration of justice through transparent and accountable courts, the doctrine of State sovereignty and human rights law. It is difficult to justify that investor-State dispute settlement grants foreign investors greater rights than domestic investors, thereby creating unequal competitive conditions. The lack of transparency of investor-State dispute settlement tribunals and concerns about the independence and impartiality of the arbitrators are fundamental problems that cannot be solved by “fixing” existing investor-State dispute settlement mechanisms, by using filters or limiting investors’ access, for example by reducing the scope of the subject-matter. Investor-State dispute settlement creates artificial incentives to gain access to privatized arbitration, exposing host States to considerable legal and financial risks. Indeed, both the remuneration of arbitrators and lawyers’ fees are unconscionably high. Investor-State dispute settlement awards have led States to abandon measures to protect public health

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Todd Tucker, “Announcement of Flawed 2012 Model BIT Shows Agenda Motivating Obama TPP Talks”, *Public Citizen* (20 April 2012). Available at: <http://citizen.typepad.com/eyesontrade/2012/04/announcement-of-flawed-investment-rules-show-agenda-motivating-obama-trade-talks.html> (accessed on 10 January 2018).

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Ska Keller Mep, “Investor-state lawsuits threaten democracy”, *The Greens, EFA Group of the European Parliament* (26 March 2014). Available at: <http://ttip2016.eu/blog/ska%20keller%20investors%20ttip.html> (accessed on 10 January 2018).

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Daniel J. Ikenson, “A Compromise to Advance the Trade Agenda: Purge Negotiations of Investment-State Dispute Settlement”, *Cato Institute* (4 March 2014). Available at: <https://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state> (accessed on 10 January 2018).

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Juergen Mark, “German Association of Judges on the TTIP Proposal of the European Commission”, *Global arbitration news* (21 March 2016). Available at: <https://globalarbitrationnews.com/german-association-judges-proposal-european-commission-introduction-investment-court-system-settle-investor-state-disputes-transatlantic-trade-investmen/> (accessed on 10 January 2018).

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“Independent Expert on the promotion of a democratic and equitable international order”, *United Nations. Human Rights. Office of the High Commissioner*. Available at: <https://www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx> (accessed on 10 January 2018).

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“Alfred-Maurice de Zayas”, Wikipedia: The Free Encyclopedia. Available at: https://en.wikipedia.org/wiki/Alfred-Maurice_de_Zayas (accessed on 10 January 2018). Cf. “Annual Reports by the Independent Expert to the Human Rights Council”, *United Nations. Human Rights. Office of the High Commissioner*. Available at: <https://www.ohchr.org/EN/Issues/IntOrder/Pages/Reports.aspx> (accessed on 10 January 2018).

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Tom Miles, “U.N. expert says secret trade deals threaten human rights”, *Reuters* (23 April 2015). Available at: <https://www.reuters.com/article/us-trade-rights/u-n-expert-says-secret-trade-deals-threaten-human-rights-id-USKBN0NE24Z20150423> (accessed on 10 January 2018).

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Phillip Inman, “UN calls for suspension of TTIP talks over fears of human rights abuses”, *Guardian* (4 May 2015). Available at: <https://www.theguardian.com/global/2015/may/04/ttip-united-nations-human-right-secret-courts-multinationals> (accessed on 10 January 2018).

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Mark Dearn, “Three ways TTIP will violate your human rights”, *Independent* (10 December 2015). Available at: <https://www.independent.co.uk/voices/three-ways-ttip-will-violate-your-human-rights-a6768086.html> (accessed on 10 January 2018).

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Alfred-Maurice de Zayas, “Promotion of a democratic and equitable international order”, *United Nations* (5 August 2015). Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285 (accessed on 10 January 2018).

and to lower environmental standards. The regulatory chill resulting from the mere existence of the investor-State dispute settlement system has dissuaded, and may in the future dissuade, States from taking measures to respect, protect and fulfil their human rights obligations and thus have a negative impact on the democratic and equitable international order.”³⁵

De Zayas highlights the “chilling effect” as a major threat to democracy and the common good, and in his report, he writes:

“Threats of expensive lawsuits against Governments are becoming more frequent than actual claims. Thus, investor-State dispute settlement has mutated from a corporate shield against allegedly unfair behaviour by States into a tactical weapon to delay, weaken and kill regulation. Specialized law firms actually encourage their multinational clients to scare Governments into submission: It’s a lobbying tool in the sense that you can go in and say, ‘Ok, if you do this, we will be suing you for compensation.’ It does change behaviour in certain cases.”³⁶

The strongest argument against the ISDS mechanism, according to de Zayas, is:

“Investor-State dispute settlement is that it subverts the rule of law so laboriously constructed over the past two hundred years by attempting to privatize justice. The establishment of a parallel system of dispute settlement, which is not transparent, accountable or even independent, cannot be tolerated. Moreover, no injustice is done to investors, because they have valid recourse options and can always rely on a functioning domestic administration of justice and/or on diplomatic protection.”³⁷

In the conclusion of his report, de Zayas points out the need to change the ISDS mechanism:

“International investment agreements must undoubtedly be revisited to ensure that they are compatible with modern international law, in particular that they acknowledge the pre-eminence of the Charter of the United Nations pursuant to Article 103. The conclusion is inescapable that while international investment agreements can be reformed in a way that will further human rights and sustainable development, investor-State dispute settlement arbitral tribunals are ontologically and conceptually flawed and fail the test of compatibility with the Charter and human rights norms. Lessons learned over the past decades indicate that ‘good practices’ in investor-State dispute settlement experience are few and far between and that the harm caused by the investor-State dispute settlement system justifies its abolition. A further question arises concerning the criminal responsibility of investors and transnational corporations when their activities cause serious harm to the environment, pollute water supplies, endanger public health, destroy food security or result in mass transfer of populations, for example, in connection with ‘mega-development’ projects, sometimes accompanied by violence and death. International criminal law in this field is gradually emerging. Until now, Investor-State dispute settlement has seemed blithely immune to such considerations.”³⁸

Special Rapporteur de Zayas does not limit his critical attitude to the ISDS mechanism only to the reports he wrote and submitted to the UN General Assembly. Moreover, in many of his media and public appearances, he tirelessly repeats his key theses through destructive criticism of trade agreements such as CETA and TTIP. For example, on 19 April 2016:

“... before the Parliamentary Assembly of the Council of Europe, UN expert Alfred de Zayas explained why the investor-State dispute settlement (ISDS) mechanisms contained in trade agreements are incompatible with democracy, the rule of law and human rights.”³⁹

Mr. de Zayas said:

“Existing ISDS should be phased out and no new investment treaty should contain any provision for privatized or semi-privatized dispute settlement. It is wholly unnecessary in countries that are party to the International Covenant on Civil and Political Rights, which commits States to due process and the rule of law.”⁴⁰

He was also very critical about the proposed substitution of the ISDS mechanism with a permanent court for investors, the so-called Investment Court System (ICS):

“Investor-State dispute settlement is unfortunately not dead, and the proposed TTIP Investment Court System is but a zombie of ISDS, which suffers from many of the same fundamental flaws.”⁴¹

He especially warned of the danger of signing the CETA agreement without holding a referendum:

“The danger of CETA and TTIP being signed and one day entering into force is so serious that every stakeholder, especially parliamentarians from EU Member States, should now be given the opportunity to articulate the pros and cons. The corporate-driven agenda gravely endangers labour, health and other social legislation, and there is no justification to fast-track it. Civil society should demand referendums on the approval of CETA or any other such mega-treaty that has been negotiated behind closed doors.”⁴²

Conclusion

As can be seen from these few examples we have mentioned in our paper, the ISDS mechanism is an effective means of corporate domination over sovereign states. Only, in this way, corporations make a profit and protect their harmful effects, and the very announcement of a lawsuit leads to paralysis in the regulatory processes of the defendants. Sometimes it is enough only to announce a lawsuit to make a state change its position and give up the planned introduction of, let us say, more stringent environmental protection rules or when it comes to the banking sector, more stringent control of banks’ risky behaviour.

Unfortunately, we have a recent example of this also in Croatia, where a group of eight foreign-owned banks threatened to file a claim for damages against the Republic of Croatia at the arbitral tribunal for investors in Washington. The cause for the threat of a lawsuit was the decision of the Croatian Parliament on the conversion of loans in Swiss francs and freezing the Swiss franc exchange rate. The banks consider themselves damaged with this decision and plan to claim compensation in the amount of 8 billion Croatian kunas in court. If the banks win the case, and this could easily happen thanks to such arbitration procedures, Croatian taxpayers will be forced to settle the imaginary damage of commercial banks in the Republic of Croatia from their tax.

This example demonstrates how international trade agreements and clauses in them can be far from fundamental ethical principles and moral norms. From

35

Ibid.

36

Ibid.

37

Ibid.

38

Ibid.

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“Investor-State dispute settlement undermines rule of law and democracy, UN expert tells Council of Europe”, *United Nations. Human Rights. Office of the High Commissioner*. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19839> (accessed on 10 January 2018).

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Cécile Barbière, “TTIP investment court ‘incompatible with human rights’”, *Euractiv* (20 April 2016). Available at: <https://www.euractiv.com/section/trade-society/news/ttip-investment-court-incompatible-with-human-rights/> (accessed on 10 January 2018).

41

Ibid.

42

Barbara Tasch, “UN human rights expert: CETA is incompatible with the rule of law, democracy, and human rights”, *Business Insider* (29 October 2016). Available at: <http://uk.businessinsider.com/un-human-rights-expert-ceta-incompatible-with-democracy-human-rights-2016-10> (accessed on 10 January 2018).

this brief analysis, it becomes apparent that international trade agreements are imposed on the public despite the ubiquitous evidence of their harmfulness to the common good.

By imposing international trade agreements, political elites primarily promote corporate interests, which are reflected through the profit level. Public opinion and damage to the public, democratic norms, human, animal, and environmental health are sacrificed on the altar of corporate profits.

We will conclude with the analysis by Archbishop Silvano Tomasi on behalf of the Holy See that was given at the Ninth WTO Ministerial Conference, held in Bali, Indonesia, in December 2013:

“While a minority is experiencing exponential growth in wealth, the gap is widening to separate the vast majority from the prosperity enjoyed by those happy few. This imbalance is the result of ideologies that defend the absolute autonomy of the marketplace and of financial speculation. Consequently, there is an outright rejection of the right of States, charged with vigilance for the common good, to exercise any form of control. A new tyranny is thus born, invisible and often virtual, which unilaterally and relentlessly imposes its own laws and rules. An even worse development is that such policies are sometimes locked in through trade rules negotiated at the WTO or in bilateral or regional [free trade agreements]. Debt and the accumulation of interest also make it difficult for countries to realize the potential of their own economies and keep citizens from enjoying their real purchasing power. To all this, we can add widespread corruption and self-serving tax evasion, which have taken on worldwide dimensions. The thirst for power and possessions knows no limits. In this system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenceless before the interests of a deified market, which become the only rule.”⁴³

Ivica Kelam

Izvan-sudski postupak arbitraže

Izazov demokraciji, etici, okolišu i vladavini prava

Sažetak

Donedavno, međunarodni trgovinski sporazumi nisu izazivali reakcije javnosti i smatrali su se nevažnima za svakodnevni život. Istraživanje postojećih međunarodnih trgovinskih sporazuma, od NAFTA-e, preko TPP-a, do TTIP-a i CETA-e, koji su u procesu pregovaranja ili ratifikacije, pokazalo je da imaju ogroman utjecaj na svakodnevni život građana te da utječu na cijelo društvo i ekonomiju. Navedeni sporazumi pregovaraju se i zaključuju zanemarujući etičke principe, demokratske procedure i ljudska prava, a u obzir se uzimaju jedino ekonomski interesi. U ovom radu istražujemo kako ti sporazumi narušavaju svima svojstvene etičke principe i demokratske standarde putem izvan-sudskog postupka arbitraže (ISDS; engl. Investor to state dispute settlement), namećući ekonomski interes krupnog kapitala protiv dobrobiti društva, pojedinca i okoliša. Posebno ćemo se referirati na rad Alfreda-Mauricea de Zayasa, neovisna eksperta Ujedinjenih naroda za promicanje demokratskog i pravičnog poretka (također znan i kao posebni izvjestitelj), koji u izvještajima Općoj skupštini Ujedinjenih naroda te u medijima žestoko kritizira ISDS mehanizme i implementiranje u sporazume poput CETA-e i TTIP-a.

Ključne riječi

trgovački sporazum, ISDS, TTP, TTIP, CETA, Alfred-Maurice de Zayas, posebni izvjestitelj, Ujedinjeni narodi, demokracija, kapitalizam

Ivica Kelam

Investor-Staat-Streitbeilegung

Herausforderung für Demokratie, Ethik, Umwelt und Rechtsstaatlichkeit

Zusammenfassung

Bis vor Kurzem haben internationale Handelsabkommen keine öffentliche Reaktion hervorgerufen und wurden als irrelevant für das alltägliche Leben betrachtet. Die Erfahrungen mit den bestehenden internationalen Handelsabkommen, von NAFTA über TPP bis TTIP und CETA, die sich derweil im Prozess der Verhandlungen bzw. Ratifizierung befinden, haben gezeigt, dass sie eine enorme Einwirkung auf das tägliche Leben der Bürger ausüben und die gesamte Gesellschaft und Wirtschaft betreffen. Diese Abkommen werden ausgehandelt und geschlossen, indem ethische Grundsätze, demokratische Verfahren und Menschenrechte vernachlässigt werden, wobei nur wirtschaftliche Interessen berücksichtigt werden. In diesem Paper werden wir untersuchen, wie diese Abkommen durch den ISDS-Mechanismus universelle ethische Grundsätze und demokratische Standards untergraben und das wirtschaftliche Interesse des Großkapitals dem Wohl der Gesellschaft, des Einzelnen und der Umwelt auferlegen. Wir werden uns speziell auf die Arbeit von Alfred-Maurice de Zayas beziehen, dem Unabhängigen Experten der Vereinten Nationen für die Förderung einer demokratischen und gerechten internationalen Ordnung (auch als Sonderberichtersteller bekannt), der in seinen Berichten an die Generalversammlung der Vereinten Nationen sowie in seinen Medienauftritten den ISDS-Mechanismus und dessen Einbettung in die Abkommen wie CETA und TTIP heftig kritisiert.

Schlüsselwörter

Internationales Handelsabkommen, ISDS, TTP, TTIP, CETA, Alfred-Maurice de Zayas, Sonderberichtersteller, Vereinte Nationen, Demokratie, Kapitalismus

Ivica Kelam

Règlement des différends entre investisseurs et Etats

Un défi pour la démocratie, l'éthique, l'environnement et la primauté du droit

Résumé

Jusqu'à récemment, les accords commerciaux internationaux n'ont pas suscité des réactions dans l'opinion publique et étaient considérés comme non pertinents dans la vie quotidienne. L'expérience dans le domaine des accords commerciaux internationaux en vigueur; de l'ALENA, en passant par le PTPGP, au PTCI et l'AECG, en cours de négociation ou de ratification, a montré qu'ils ont un impact considérable sur la vie quotidienne de l'ensemble de la société et de l'économie. Lesdits accords sont négociés et conclus en négligeant les principes éthiques, les procédures démocratiques et les droits humains, où seuls les intérêts économiques sont pris en compte. Dans cet article, nous explorerons la manière dont ces accords nuisent aux principes éthiques universels et les normes démocratiques par le biais du mécanisme ISDS, imposant l'intérêt économique des gros capitaux au détriment du bien-être de la société, de l'individu et de l'environnement. Nous ferons référence en particulier aux travaux d'Alfred-Maurice de Zayas, Expert indépendant auprès des Nations Unies pour la promotion d'un ordre international démocratique et équitable (également appelé Rapporteur spécial), qui, dans ses rapports à l'Assemblée générale des Nations Unies et dans les interventions médiatiques, critique vivement le mécanisme ISDS et sa mise en œuvre dans des accords tels que le AECG et le PTCI.

Mots-clés

accord commercial international, ISDS, PTPGP, PTCI, AECG, Alfred-Maurice de Zayas, Rapporteur spécial, Nations Unies, démocratie, capitalisme